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Cases, Regulations, and Statutes

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FOOTNOTES

[1] See generally 8 Harl, Agricultural Law § 62.04[3]. (1992).

[2] Rev. Rul. 66-159, 1966-1 C.B. 162. See I.R.C. § 1034.

[3] Ltr. Rul. 8007050, Nov. 23, 1979.

[4] Ltr. Rul. 8239055, June 29, 1982 (trustee was adverse party as to 25 percent of trust so 75 percent of residence eligible); Ltr. Rul. 9118017, Feb. 1, 1991 (trustors had power unlimited by any conditions, to remove trustee and substitute anyone, including themselves as trustee; trustee had power to make discretionary distributions from income and principal and not limited by reasonably definite standard).

[5] Treas. Reg. §§ 1.611-1(c)(4), 1.167(h)-1(b).

[6] I.R.C. § 179(d)(4).

[7] Ltr. Rul. 7747007, Aug. 19, 1977; Ltr. Rul. 8132027, May 1, 1981.

[8] See Ltr. Rul. 8326023, March 23, 1983 (no acceleration on transfer of corporate stock to grantor trust, when grantor trust terminated with corpus distributed to beneficiaries or when trust terminated by reason of death of beneficiary with interest passing to family member). See also Ltr. Rul. 9116009, Jan. 15, 1991 (transfer of property from one revocable living trust to another inter vivos trust (of heir) were change in form and not disposition).

[9] See I.R.C. § 2032A.

[10] See I.R.C. § 2032A(g). See 5 Harl, Agricultural Law § 43.03[2][e] (1992).

[11] I.R.C. § 2032A(c).

[12] Ltr. Rul. 7826024, March 28, 1978; Ltr. Rul. 9009053, Dec. 6, 1989 (grantor considered to be owner of revocable living trust).

[13] Ltr. Rul. 7907120, Nov. 17, 1978.

[14] Rev. Rul. 74-613, 1974-2 C.B. 153.

[15] See I.R.C. § 691(a).

[16] I.R.C. § 1244(d)(4).

[17] E.g., Iowa Code § 496C.10.

[18] I.R.C. § 1361(c)(2).

[19] *I.d.*

[20] Black v. Comm'r, 765 F.2d 862 (9th Cir. 1985).

[21] Est. of May v. Comm'r, T.C. Memo. 1978–20.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

ADVERSE POSSESSION

CONTINUOUS POSSESSION. The disputed land was created by rimrock which prevented placing a fence on the true boundary between the parties' properties. The disputed area was unimproved and not used by the defendant until 1989 when the defendant rebuilt the fence as part of a pasture. The plaintiff sought an injunction and the defendant asserted ownership of the disputed land by adverse possession. The court upheld judgment for the plaintiff because the defendant failed to show actual, open, visible and continuous occupancy for more than 20 years. The defendant argued that the doctrine of boundary by acquiescence applied because the fence had been recognized as the boundary for over 20 years. The court disagreed and held that the doctrine of boundary by acquiescence applied only as to the element of hostile occupancy and first required actual and continuous occupancy in order to be applied. **Lien v. Beard, 478 N.W.2d 578 (S.D. 1991)**.

BANKRUPTCY

GENERAL

ABSOLUTE PRIORITY RULE. The debtors owned a farm under a sole proprietorship and in their Chapter 11 plan proposed to contribute their labor and exempt property to the farm business to satisfy the absolute priority rule. The debtors' attorney also agreed to be paid out of future farm earnings instead of estate property. The debtors claimed that because the farm business had little or no "going concern" value, the debtors did not retain any interest of value. The court rejected this argument, noting that the U.S. Supreme Court in *In re Ahlers, 485 U.S. 197 (1988)*, held that the retained control over the business and possible future earnings from the business were not sufficient retained interests to invoke the absolute priority rule. The court held that there was no new value exception to the absolute priority rule, but even under such an exception, the debtors' contribution must be necessary for the reorganization and must be substantial and exceed the value of the debtors' retained interests in the business. The debtors were held not to have met the burden of showing their entitlement to the exception. ***In re* Drimmel, 135 B.R. 410 (D. Kan. 1991), *aff'g*, 108 B.R. 284 (Bankr. D. Kan. 1989)**.

AUTOMATIC STAY. The debtor was a 50 percent shareholder in a corporation with one other 50 percent shareholder. Because of disagreements between the shareholders, a provisional director was appointed prior to the debtor's filing for bankruptcy. After the debtor filed for bankruptcy, the other director persuaded the provisional director to vote in favor of issuing additional stock to the other director in exchange for corporate debt held by the director, thus decreasing the debtor's stock share to less than 50 percent. The debtor sought to avoid the stock transfer as violating the automatic stay and the other director sought relief from the automatic stay for a state court action to remove the provisional director. The court held that the actions of the corporation through its board of directors did not violate the automatic stay in a shareholder's bankruptcy case but that a state court action in which the debtor was named as a defendant was stayed by the bankruptcy case. ***In re* Calvert, 135 B.R. 398 (Bankr. S.D. Cal. 1991)**.

AVOIDABLE LIENS. The debtor claimed an exemption in household goods subject to a nonpossessory, nonpurchase money security interest. Under Ohio Code § 2329.66, an exemption in such property was allowed only where the property was not subject to a third party lien. The court held that under *Owen v. Owen, 111 S.Ct. 1833 (1991)*, the test for avoidable liens against exempt property was whether the property was exempt but for the lien. Therefore, the Ohio limitation on the exemption did not prevent avoidance of the lien. ***In re* Sullens, 135 B.R. 288 (Bankr. S.D. Ohio 1991)**.

ESTATE PROPERTY. The District Court decision in *In re Lybrook*, see p. 42 *supra*, has been published. ***In re* Lybrook, 951 F.2d 136 (7th Cir. 1991, *aff'g*, 135 B.R. 321 (N.D. Ind. 1990), *aff'g*, 107 B.R. 611 (Bankr. N.D. Ind. 1989)**.

EXEMPTIONS

HOMESTEAD. The debtor purchased two duplexes by land contract and claimed the land as an exempt homestead. The court held that a land contract vendee's interest in a residence was eligible for the homestead exemption. ***In re* Mastowski, 135 B.R. 1 (Bankr. W.D. N.Y. 1992)**.

Within six months prior to filing for bankruptcy, the debtor sold a rural homestead and purchased an urban homestead with about one-third of the proceeds. The debtor claimed a homestead exemption under Tex. Prop. Code § 41.001 for the remaining proceeds of the sale of the rural homestead. The debtor argued that under Section 41.001(c), the proceeds of the sale of a homestead remained exempt for six months. The court held that the proceeds were not exempt because the debtor abandoned the homestead claim in the proceeds to the extent the proceeds were not used to purchase a new homestead. ***In re* Evans, 135 B.R. 261 (Bankr. S.D. Tex. 1991)**.

IRA'S. The debtor claimed an interest in an IRA as exempt under the federal exemption, 11 U.S.C. § 522(d)(10)(E). The debtor was age 57 and still employed. The court adopted the holding of *In re Clark, 711 F.2d 21 (3d Cir. 1983)* that only a present right to receive payments from an IRA is exempt under Section 522(d)(10)(E) and that the debtor's future right to receive payments upon reaching age 61 1/2 was not exempt. **Matter of Chick, 135 B.R. 201 (Bankr. D. Conn. 1991)**.

PENSION PLAN. The debtors, husband and wife, each had a vested interest in an employee pension plan. The husband's plan allowed the husband to direct the investment of the funds, borrow up to 25 percent of the fund and to seek distribution of up to 25 percent of the fund for certain purposes. The court held that the husband's interest in the pension fund was not a spendthrift trust and was not exempt because the fund was not needed for the support of the debtor or wife. The wife's pension plan was provided by a governmental employer and contained an anti-alienation clause required by federal law. The court held that although the wife's pension plan was also not a spendthrift trust, the wife interest in the plan was exempt under nonbankruptcy law. ***In re* Sawyers, 135 B.R. 371 (Bankr. W.D. Mo. 1992)**.

The debtor was a physician and sole shareholder of a professional corporation which established an ERISA qualified pension plan. The court held that the plan was not excluded from the bankruptcy estate as a spendthrift trust because the debtor as sole shareholder had control over the pension fund. In addition, the court held that ERISA pre-empted the Arizona exemption for pension plans and the plan was not exempt under ERISA as nonbankruptcy law exemption. ***In re* Reed, 951 F.2d 1046 (9th Cir. 1991)**.

CHAPTER 12

PLAN. The debtor's Chapter 12 plan provided for complete satisfaction of an undersecured creditor's claim by either transfer of the farm land collateral or reduction of the claim to the fair market value of the farm land and payment of the new principal over 40 years at 9 percent interest. The first option was selected by the debtor and the creditor objected to the plan as not meeting Section 1225. The court held that under Section 506, the undersecured claim was to be divided into a secured and unsecured claim. The debtor argued that under Section 1225(a)(5)(C), the plan must be confirmed if a secured claim is satisfied by surrendering the collateral. The court held that a plan could not be confirmed because the plan did not contain provisions to cover the contingencies of the surrendered property being worth less or more than the secured claim. In addition, the plan could not be confirmed because the plan made no provision for payment of disposable income for the unsecured portion of the creditor's claim and the creditor would not receive the same amount as in a Chapter 7 liquidation. ***In re* Fobian, 951 F.2d 1149 (9th Cir. 1991)**.

FEDERAL TAXATION

CLAIMS. Although the Chapter 7 debtor listed the IRS as a creditor in the bankruptcy schedules, the claim was listed at zero and the IRS did not file a claim in the case. After the debtor received the discharge, the IRS filed a notice of levy for pre-petition taxes. The debtor sought to include the IRS claim in the bankruptcy case as a late filed claim. The court held that although the untimely filed claim was not allowable under the bankruptcy rules because the debtor did not show excusable neglect in failing to timely file the claim, the late filed claim would be allowed but would be subordinated to all other unsecured creditors. ***In re* Crawford, 135 B.R. 128 (D. Kan. 1991)**.

GOVERNMENTAL IMMUNITY. An officer of the corporation debtor made a post-petition transfer of corporate funds to pay the officer's individual income tax liability and the bankruptcy trustee sought to recover the transfer under Section 549(a) from the IRS. The court held that Section 106(c) does not waive governmental immunity from a monetary recovery action; therefore, the action to recover the post-petition transfer was barred by governmental immunity. **U.S. v. Nordic Village, Inc., 92-1 U.S. Tax Cas. (CCH) ¶ 50,109, 135 B.R. p 16 (yellow) (S. Ct. 1992), rev'g, 915 F.2d 1049 (6th Cir. 1991)**.

JURISDICTION. The debtor and spouse filed joint income tax returns but the spouse was not included in the bankruptcy case. Although the IRS was receiving payment under the debtor's Chapter 13 plan for taxes owed jointly, the IRS levied against the spouse's property. The debtor argued that the levy violated the automatic stay. The court held that it had no jurisidiction over matters between the IRS and the nondebtor spouse. ***In re* Goldsby, 92-1 U.S. Tax Cas. (CCH) ¶ 50,118 (Bankr. E.D. Ark. 1992)**.

POST-PETITION SECURITY INTERESTS. The IRS had filed a notice of tax lien in 1988 and the debtor filed for Chapter 7 bankruptcy in 1989. After the bankruptcy filing, the debtor received an inheritance which became estate property and the IRS filed a claim as secured based upon the pre-petition tax lien. The court held that the automatic stay prevented the pre-petition lien from attaching to the post-petition acquired property. ***In re* Fuller, 92-1 U.S. Tax Cas. (CCH) ¶ 50,119 (Bankr. 9th Cir. 1992)**.

RETURNS. After the debtors' Chapter 11 plan was confirmed, the debtors transferred some of the estate property in trust to a trustee for the purpose of liquidating the property and distributing the proceeds as required by the plan. The court held that the liquidating trustee was required to file a federal income tax fiduciary return and pay any tax liability resulting from the sale of the trust property. **Holywell Corp. v. Smith, 92-1 U.S. Tax Cas. (CCH) ¶ 50,110, 135 B.R. p. 34 (yellow) (S. Ct. 1992), *rev'g*, 911 F.2d 1539 (11th Cir. 1990)**.

FEDERAL AGRICULTURAL PROGRAMS

ADMINISTRATIVE PROCEDURE. The plaintiff was a dairy farmer who enrolled in the Dairy Termination Program (DTP). The ASCS ruled that the plaintiff had violated the DTP contract in that two cows were not destroyed and were still being milked by a former employee of the plaintiff on another farm. Although the plaintiff pursued the ruling through DASCO and presented substantial evidence to refute the statements of the former employee as to how the cows escaped slaughter, the plaintiff was not allowed to cross-examine the former employee. The court first held that the DASCO decision was not reviewable de novo because the instant case was a review of an administrative decision and not a contract case. The court also held that the administrative appellate procedure was governed by the ASCS appeal regulations, 7 C.F.R. Part 780, and not the Administrative Procedures Act. However, the court held that the ASCS abused its discretion under Part 780 in not allowing cross-examination of the former employee, given the substantial contradictory evidence and the ASCS strong reliance on the former employee's statements in finding that the plaintiff had violated the DTP contract. In addition, in its remand order, the court required DASCO to make specific findings as to the knowledge of the plaintiff as to the removal of the cows by the former employer, because if the plaintiff did not know about the removal, the plaintiff could not be held in violation of the contract. **Doty v. U.S., 24 Cls.Ct. 615 (1991)**.

ALIEN AGRICULTURAL WORKERS. Sod farmers brought suit to invalidate regulations under the Immigration Reform and Control Act of 1986 excluding sod from the definition of "other perishable commodities" produced by "seasonal agricultural services." The exclusion resulted in ineligibility of illegal alien sod workers for participation in the amnesty program which would have allowed the workers to become citizens. The court held that the exclusion was reasonable, given the differences in the growing and harvesting requirements of sod from other types of agricultural commodities. Note: After the initial decision against the regulations, the USDA amended the regulations to include sod workers and the sod workers were granted citizen status. However, as the court noted in this case, the Attorney General has the power to revoke the grant of citizenship if the workers are later found to not have been qualified for the program. **Morales v. Yeutter, 952 F.2d 954 (7th Cir. 1991), *rev'g*, 772 F. Supp. 1033 (N.D. Ill. 1990)**.

COMMODITY FUTURES TRADING. The CME has announced proposed amendments to the feeder cattle futures contract which would (1) reduce the geographic region from which cash prices are collected for purposes of calculating the cash settlement price, (2) reduce the weight range of feeder steers for which the cash prices underlying the cash settlement price are collected, (3) specify the frame and muscling characteristics of those feeder steers for which cash prices are eligible for calculating the cash settlement price, (4) change the cash settlement price's calculation procedures to provide for a fully weighted average cash settlement price with the price of each transaction being weighted by the weight of the feeder steers included in the transaction, (5) replace Cattle Fax, Inc. with the USDA-AMS as the organization responsible for collecting the cash prices underlying the cash settlement price, and (6) increase the futures contract's trading unit from 40,000 to 50,000 pounds. **57 Fed. Reg. 7570 (Mar. 3, 1992)**.

The NYCE has applied for designation as a contract market in futures options on cotton No. 2 straddles. **57 Fed. Reg. 6714 (Feb. 27, 1992)**.

CONVERSION. The defendant was convicted of conversion of FmHA collateral for the sale of cattle which secured an FmHA loan without prior consent of the FmHA. The defendant argued that the element of intent to defraud was not supported by the evidence in that the defendant had the authority to sell the cattle. The court held that sufficient evidence was presented in that the defendant testified that all checks for collateral had to have the defendant's and FmHA's name on them. **U.S. v. Edgmon, 952 F.2d 1206 (10th Cir. 1991)**.

PAYMENT LIMITATION. The plaintiffs were divorced equal shareholders in a cotton ginning corporation. The corporation provided financing to several cotton farming operations which leased land from the shareholders. One operation was a partnership of one shareholder and the shareholder's daughter. One operation was a partnership with one shareholder and two unrelated partners. One operation was owned by a daughter of a shareholder, and one operation was a partnership of unrelated persons. The ASCS had ruled that all of the persons and entities were one person for purposes of the $50,000 payment limitation rule because the ginning corporation provided financing and had an indirect interest in the farming operations financed. The court held that because the financing of the partnership and individual operations was not provided by the partners to the extent of their individual interests in the operation, the partners could not be considered separate persons. However, the corporation argued that it was eligible for the exception of ASCS Handbook 5-CM as an "institution established to provide commercial credit to individuals or entities." The ASCS argued that the exception was intended only for banks or other lending institutions, but the court found no support for this interpretation in the Handbook or regulations and held that the ginning corporation qualified for the exception. In making the original ruling, the ASCS had mitigated the penalty to all of the operations except the mother-daughter partnership, because only one partner had signed the financing agreements and the partnership had indicated on its farm operating plan that it would obtain bank financing. The court held that the exclusion of the partnership on these grounds was arbitrary and capricious because the ASCS had found that all parties had filled out their operating plans to the best of their abilities. **Golightly v. Yeutter, 780 F. Supp. 672 (D. Ariz. 1991)**.

FEDERAL ESTATE AND GIFT TAX

CHARITABLE DEDUCTION. In an attempt to provide support for a medically disabled relative without endangering the relative's medicaid eligibility, the decedent's will bequeathed property in trust to the relative's parent for the care and support of persons with similar disabilities to the relative's. Other heirs challenged the will's trust provision as establishing a passive trust and the executor sought probate court reformation of the trust as a charitable bequest. The IRS ruled that the transfer to the trust was not eligible for a charitable deduction. **Ltr. Rul. 9209008, Nov. 27, 1991**.

DISCLAIMERS. The decedent and surviving spouse had acquired real property in 1984 as tenants by the entirety. After the decedent's death in 1989, the surviving spouse executed a written disclaimer of the decedent's interest in the property which passed to the spouse as survivor of the tenancy. The IRS distinguished this case from several joint tenancy cases which held that a disclaimer of a survivor's interest in a joint tenancy could be made within nine months after the joint tenant's death because a joint tenant could sever the joint tenancy unilaterally. The IRS ruled that in the case of a tenancy by the entireties under Arkansas law, the tenancy could be severed only by consent of both tenants; therefore, the surviving spouse's disclaimer had to be made within nine months after creation of the tenancy in order to be effective for federal estate tax purposes. **Ltr. Rul. 9208003, Oct. 28, 1991**.

SPECIAL USE VALUATION. The IRS has issued the list of average annual effective interest rates charged on new loans by the Farm Credit Bank system to be used in computing the value of real property for special use valuation purposes:

District	Interest rate
Baltimore	10.15
Columbia	10.87
Louisville	10.81
Omaha	10.10
Sacramento	11.50
St. Louis	10.18
St. Paul	10.54
Spokane	10.65
Springfield	10.44
Texas	10.21
Wichita	10.13

Rev. Rul. 91-12, I.R.B. 1991-9, 18.

MARITAL DEDUCTION. On the estate tax return, the executor claimed a marital deduction for property passing in trust to the surviving spouse but failed to make the QTIP election. The IRS allowed an extension to file an amended Schedule M to make the election because the executor demonstrated the requisite intent to make the election in the original return. **Ltr. Rul. 92009003, no date given**.

FEDERAL INCOME TAXATION

ACCOUNTING METHOD. The IRS has issued new procedures for changing a taxpayer's accounting method without obtaining consent from the IRS. The requirements differ for (1) requests made before an examination, (2) requests made within 90 days after notice of an examination, and (3) requests made as a result of an examination. **Rev. Proc. 92-20, I.R.B. 1992-12, 6**.

ALTERNATIVE MINIMUM TAX. In determining their altnerative minimum tax, the taxpayers added their tax preferences to their negative taxable income. The taxpayers argued that because the tax on the resulting figure would otherwise have been reduced by their general business credits, the tax preference items could be reduced by the amount of unused general business credits. The court held that the taxpayers could not reduce the tax preference items by the amount of unused general business credits. **U.S. v. Deckelbaum, 92-1 U.S. Tax Cas. (CCH) ¶ 50,127 (D. Md. 1992)**.

COOPERATIVES. A non-exempt purchasing and supply cooperative had income from the recurring but temporary investment of excess funds. The excess funds resulted from required contributions by member/patrons which were redeemed in later years. In addition, the cooperative terminated a deferred income plan, distributing the members' contributions to the members but retaining income from investment of the plan principal. In ruling that the investment income was not patronage sourced income, the IRS disagreed with several cases which had held that the income from the temporary investment of excess funds was patronage sourced income. The IRS stated that such income was not patronage sourced income because the income was not derived from or furthered the cooperative function of the business. Instead, the IRS saw such income as only furthering the overall profitability of the business. As to the income from the deferred compensation plan, the IRS also ruled that the income was not patronage sourced income because the investment did not further the cooperative functions of the business. **Ltr. Rul. 9208004, Oct. 31, 1991**.

C CORPORATIONS

DISTRIBUTIONS OF STOCK. The taxpayer corporation was a general partner in a partnership and owned the stock of another corporation. The taxpayer's responsibilities as a partner included management and administration of rental properties owned by the partnership. The taxpayer sought tax-free distribution of its stock in the other corporation to its shareholders under I.R.C. § 355. The IRS ruled that the taxpayer's involvement in the management and administration of the partnership rental properties was an active trade or business, making the stock distribution eligible for Section 355 treatment. **Rev. Rul. 92-17, I.R.B. 1992-12, 16**.

ESTIMATED TAXES. The IRS has announced that the new rules for determining estimated tax payments instituted by the Unemployment Compensation Act of 1991 are effective beginning with the second quarterly estimated tax payments. The new rules do not apply to farmers or fishermen or to individual taxpayers with less than $75,000 in adjusted gross income and an increase of annual income of more than $40,000. The revised Publication 505, "Tax Withholding and Estimated Tax," is available by calling, 1-800-TAX FORM. **I.R. 92-18, Feb. 28, 1992**.

INVOLUNTARY CONVERSION. The taxpayer owned forest land for the purpose of preserving the land in a natural state for wild flora and fauna. The forest suffered damage from Hurricane Hugo and the taxpayer decided to remove damaged trees and sell them. The taxpayer sought approval that the loss of the trees was an involuntary conversion such that the gain realized from the sale of the damaged trees would not be taxable because the proceeds were used to purchase adjacent additional forest land. The IRS distinguished this case from *Rev. Rul. 80-175, 1980-2 C.B. 230* where trees grown for lumber were damaged by a hurricane and were forced to be sold as salvage with the proceeds used to purchase other standing timber. The IRS ruled that in the instant case, the removal of the trees and their sale were not required because the damage by the hurricane did not render the land unusable for the purpose, natural habitat, intended by the taxpayer. The removal and sale of the trees only enhanced the regeneration of the forest which would have occurred in any case. In addition, the purchase of the adjacent land was not a replacement of the damaged land but was an acquisition of additional land. Therefore, the hurricane damage was not an involuntary conversion. **Ltr. Rul. 9209006, Nov. 15, 1991**.

PARTNERSHIPS

ADMINISTRATIVE ADJUSTMENTS. The IRS mailed the FPAA notice to the partnership at its last known address but did not indicate a Tax Matters Partner (TMP). The IRS also mailed the FPAA to the TMP but did not refer to the partner as the TMP. The court ruled that the FPAA notice was adequate. **Ophir Mine v. Comm'r, T.C. Memo. 1992-119**.

ADJUSTMENT OF BASIS OF PARTNERSHIP PROPERTY. A partnership with two equal partners owned a capital asset and an interest in another partnership which owned a capital asset and a noncapital asset. Both partnerships had valid Section 754 elections to adjust basis in partnership property. In the first situation, the upper-tier partnership distributed one-half of its capital asset to one partner. In the second situation, the upper-tier partnership distributed its interest in the lower-tier partnership to the partner. In the first situation, the IRS ruled that the upper-tier partnership adjusts the basis of the undistributed portion of the capital asset and interest in the other partnership in proportion to the difference between the value and the basis of each asset. The lower tier partnership will adjust the basis of its property only as to the interest of the upper-tier partnership. In the second situation, the IRS ruled that the upper-tier partnership adjusts the basis of the capital asset by the amount of the basis in the distributed property over the basis of the distributed property in the hands of the receiving partner. The lower-tier partnership also adjusts the basis of its property unless their fair market value exceeds their basis. In both cases, the distributions are not considered a sale or exchange for purposes of terminating either partnership. **Rev. Rul. 92-15, I.R.B. 1992-12, 12**.

QUALIFIED DEBT INSTRUMENTS. The IRS has announced the 1992 inflation adjusted amounts of debt instruments which qualify for the 9 percent discount rate limitation under I.R.C. §§ 483 and 1274:

Year of Sale or Exchange	1274A(b) Amount	1274A(c)(2)(A) Amount
1992	$3,234,900	$2,310,600

Rev. Rul. 92-6, I.R.B. 1991-4, 7.

RETIREMENT PLANS. For plans beginning in February 1992 the weighted average is 8.39 percent with the permissible range of 7.55 to 9.23 percent for purposes of determining the full funding limitation under I.R.C. § 412(c)(7). **Notice 92-8, I.R.B. 1992-9, 5**.

RETURNS. The IRS has issued an update of the circumstances under which the disclosure on a taxpayer's return of a position is adequate for purposes of reducing the understatement of income tax under I.R.C. § 6662(d), and tax preparer's penalty under I.R.C. § 6694(a). The update contains no substantive changes from prior revenue procedures. **Rev. Proc. 92-23, I.R.B. 1992-13, 11**.

S CORPORATIONS

RE-ELECTION. An S corporation owned by three shareholders voluntarily terminated the S corporation election as of the same date all stock was sold to an unrelated person. The new owner sought re-election of the S corporation status four years later. The IRS ruled that the re-election would be allowed. **Ltr. Rul. 90209021, Nov. 27, 1991**.

STATUTE OF LIMITATIONS. The IRS assessed a deficiency against an S corporation shareholder attributable to disallowance of a corporate loss. The assessment was made after three years after the S corporation return but within three years of the shareholder's return. The Tax Court held that the statute of limitations was to be applied at the shareholder level. The decision conflicts with the decision in *Kelley v. Comm'r, T.C. Memo. 1986-405, rev'd 89-1 U.S.T.C. ¶ 9360 (9th Cir. 1989)*. **Felhaber v. Comm'r, 92-1 U.S. Tax. Cas. (CCH) ¶ 50,131 (11th Cir. 1992), *aff'g*, 94 T.C. 863 (1990)**.

TAXABLE INCOME. The taxpayer farmer purchased three $20,000 certificates of deposit in 1985 and the IRS alleged that the money was income. The court found that the taxpayer received the money as a gift in 1927 from a grandparent who admonished the taxpayer to save the money to care for the taxpayer's mother. The taxpayer claimed to have kept the money hidden until after the mother died because the taxpayer distrusted banks and feared theft. The court held that the taxpayer's story was credible and overcame the presumption that the bank deposits were income. **Howard v. U.S., 779 F. Supp. 432 (S.D. Ind. 1991)**.

MORTGAGES

FORECLOSURE. The defendant was the son and tenant of a farm land owner who consented to a foreclosure judgment against the land. The land was sold and the plaintiff purchaser sought eviction of the defendant and the defendant's property. The defendant argued that the defendant had an interest in the property resulting from the tenancy and improvements made to the property and that the foreclosure judgment was not effective as to the defendant because the defendant was not made a party to the foreclosure action. The court held that the defendant's ownership interest in grain bins affixed to the foreclosed property was terminated when the lease ended and the defendant failed to file a written notice of intent to remove the grain bins. The court also held that the defendant failed to demonstrate any interest in the land adverse to the title holder because the use of the land was permitted by the lease with the title holder. **Farm Credit Bank of St. Paul v. Martinson, 478 N.W.2d 810 (N.D. 1991)**.

NEGLIGENCE

INVITEE. The plaintiff was the owner of a grain truck damaged when the truck slipped off a bridge constructed by the defendant on the defendant's property. The truck was hauling grain for an adjacent landowner. The plaintiff had called the defendant to inquire whether the bridge would support a large semi carrying grain and the defendant had warned that the bridge would hold a semi but that the semi had to stay in the center. Although the trial court had found the defendant partially at fault for the accident, the lower appeals court had held that the defendant's warning satisfied the defendant's duty toward an invitee. The upper appeals court held that a jury question remained as to whether the warning given by the defendant was sufficient in that the warning did not completely disclose the dangers of the bridge. The court also held improper a jury instruction allowing use of government standards for public bridges as evidence of custom generally followed in constructing private bridges. **Simon's Feed Store, Inc. v. Leslein, 478 N.W.2d 598 (Iowa 1991)**.

PRODUCT LIABILITY

ASSUMPTION OF RISK. The plaintiffs brought an action for negligence and breach of warranty against the builder of a hog confinement building which collapsed after a 28 inch snowfall. The plaintiffs had not used the building for several months prior to the collapse and the normal snow melt on the roof from the heat from the hogs did not occur. The plaintiffs objected to instructions on assumption of risk and contributory negligence, arguing that the evidence did not support either instruction. The court held that failure to remove a heavy accumulation of snow, especially after a 28 inch snowfall, was sufficient evidence that the plaintiffs assumed the risk of the roof collapsing and were contributorily negligent in failing to remove the snow. **Gerlach v. Ethan Coop. Lumber Ass'n, 478 N.W.2d 828 (S.D. 1991)**.

RIPARIAN RIGHTS

IRRIGATION DITCH. The parties were neighboring landowners with appurtenant water rights to water flowing in a ditch through the defendant's property on to the plaintiff's land. The plaintiff used the water by blocking the ditch and flooding irrigating crop land. After the defendant purchased the land, the defendant removed dirt from the ditch, causing the water flow to decrease such that flood irrigation by the plaintiff was not possible. The plaintiff sought a permanent injunction and restoration of the ditch. The defendant complied with a temporary injunction by replacing the removed dirt but the plaintiff argued that the replacement dirt was more susceptible to washout and sought to require the defendant to line the ditch with bentonite or make other repairs to restore the ditch. The court held that the repairs made were insufficient to completely restore the ditch and ordered the defendant to increase the banks of the ditch and line the banks with bentonite. **Butler v. Germann, 822 P.2d 1067 (Mont. 1991)**.

SECURED TRANSACTIONS

FORECLOSURE SALE. The plaintiff owned farm land in two counties which was subject to a foreclosure and sheriff's sale. The land was sold as separate parcels in a single sheriff's sale to the lien holder. The plaintiff was present at the sale and did not object to the sale of the land not located in the county where the sheriff's sale occurred. Over the following several years, the plaintiff filed objections to the sheriff's sale in two bankruptcy proceedings and two state court proceedings, claiming that the sale of the property in another county violated N.D. Cent. Code §§ 28-21-05 and 28-23-05. All of the objections were denied by the courts and the plaintiff appealed only the last judgment. In the meantime, the plaintiff had been evicted and the property sold to third parties. The court held that the sale did violate the statutes but that the violation made the sale only voidable. The court also held that the plaintiff had waited too long in objecting to the sale through the appeal process. **Rott v. Connecticut General Life Ins. Co., 478 N.W.2d 570 (N.D. 1991)**.

GENERIC COMMODITY CERTIFICATES. The debtors granted a bank a security interest in all crops grown or to be grown and all accounts receivable, contract rights and general intangibles, including after acquired property. Prior to filing bankruptcy, the debtors assigned part of their interests in government program payments and received generic commodity certificates for the previous crop year and the crop year of filing for bankruptcy. The trustee argued that the bank's security interest did not attach to the commodity certificate because a federal regulation, 7 C.F.R. § 770.4(b)(2), prohibited attachment of liens and security interests to the certificates. The trustee argued that the federal regulation pre-empted the state security interest law. The court followed *In re George, 119 B.R. 800 (D. Kan. 1990), see Vol 2, Agric.L.Dig., p. 7,* and held that the CCC had no authority under federal law to pre-empt state law in this area; therefore, the bank's security interest attached to the commodity certificates. ***In re* Selzer, 135 B.R. 417 (D. Kan. 1991)**.

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BORROWER'S RIGHTS. The plaintiffs' farm had been sold at foreclosure to the mortgagee. The property was redeemed by a purchaser of a junior lienor's interest in the property and the plaintiffs sued the purchaser and lien holder for failure to offer to sell the farm to the plaintiffs first as required by Minn. Stat. § 500.24. The trial court found that the plaintiffs and their wholly-owned corporation were family farmers, but the appellate court remanded on this issue for failure of the trial court to include a basis for this ruling in the record. The trial court had held that although the plaintiffs were entitled to a right of first refusal, the plaintiffs would not be allowed to purchase the farm at the sale price because the purchaser had invested substantial sums in the property. The appellate court held that if the plaintiffs were family farmers, they were entitled to specific performance of their right of first refusal and the purchaser only had a right to seek compensation for any investment. **Lilyerd v. Carlson, 478 N.W.2d 534 (Minn. Ct. App. 1991)**.

NEW PUBLICATION

Neil Hamilton, the Richard M. and Anita Calkins Distinguished Professor of Law, and Director, Agricultural Law Center at Drake University, has published **A Livestock Producer's Legal Guide to: Nuisance, Land Use Control and Environmental Law**. The book is written for farmers and ranchers but also contains legal citations and a discussion of agricultural nuisance statutory and case law of all 50 states. The book may be ordered for a check for $12.00 to Drake University from Drake University Agricultural Law Center, Nuisance Law Book, Des Moines, Iowa 50311.

ISSUE INDEX